United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL
and proof of service

75-2139

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

To be argued by
JESSE BERMAN

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UNITED STATES ex rel. ORLANDO RODRIGUEZ,

Petitioner-Appellee,

-against-

Docket No. 75-2139

HAROLD BUTLER, Superintendent, Wallkill Correctional Facility, Wallkill, New York,

Respondent-Appellant.

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P/S

BRIEF FOR PETITIONER - APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

JESSE BERMAN
Attorney for Petitioner-Appellee
351 Broadway
New York, New York 10013
(212) 431-4600

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BRIEF FOR PETITIONER-APPELLEE

Preliminary Statement

Respondent-Appellant Butler appeals from an order of the United States District Court for the Southern District of New York (Motley, J.), dated September 23, 1975, granting appellee Orlando Rodriguez's petition for a writ of habeas corpus.

The Court directed that appellee be retried within sixty (60) days or released. The Court also stayed the above relief pending the outcome of this appeal.

On November 3, 1975, this Court continued the appoinment of Jesse Berman, Esq., as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

1) The State-Court Proceedings

Orlando Rodriguez, petitioner-appellee herein, is confined in the custody of respondent-appellant pursuant to a judgment of the County Court, Westchester County (Beisheim, J.), rendered July 20, 1970, convicting him after trial by jury of the crime of possession of cocaine, and sentencing him to fifteen (15) years imprisonment.

The facts surrounding the seizure of the cocaine were as follows:*

On the evening in question, petitioner was observed, carrying a paper bag or package, while entering his apartment house, accompanied by two men, one of whom - Gonzalez - also lived in that same building.

The police had been waiting to arrest Gonzalez, whose phone they had been tapping and who was rumored to be picking up some drugs that night.

Petitioner, Gonzalez and the third man went up in the elevator, and petitioner got off the elevator, alone, at his floor and entered his own apartment.**

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*/ During the proceedings before Judge Motley on the instant petition for habeas corpus relief, counsel for both petitioner and respondent agreed to rely solely on the state-court minutes of suppression hearing and trial.

**/ Petitioner had been arrested several days earlier, together with Gonzalez, in New Jersey, for possession of drugs, and petitioner's name had come up in taps on Gonzalez's phone, but not on the night in question.

Gonzalez and the third man continued going up in the elevator until they reached Gonzalez's apartment (T.13-16).* There, the two men were arrested and searched by the police, who had previously obtained a warrant for Gonzalez's arrest. The search revealed no contraband.

Lawrence Martin, an assistant district attorney in charge of the Gonzalez investigation, was present in Gonzalez's apartment at the time Gonzalez was arrested. Martin was reminded by one of the officers of petitioner's prior association with Gonzalez and of the fact that petitioner's name had appeared earlier in tapped conversations. Martin then directed the police to go to petitioner's apartment and to arrest petitioner for conspiracy to possess drugs:

> I did not send them to make a search or seize narcotics. I sent them to arrest for a conspiracy for narcotic drugs.
>
> (SH. 42,** emphasis added; also at SH.21,36 and T.17).

The officers - at least four officers - then obtained from the building superintendent a passkey to petitioner's apartment (T. 18). They entered petitioner's apartment, at approximately 3 a.m., without first knocking or announcing their authority. The officers had neither an arrest warrant for petitioner, nor a search warrant for his apartment (SH.23).

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*/ "T" refers to minutes of trial, June 24-26, 1970.

**/ "SH" refers to minutes of the suppression hearing, April 14, 1970.

There was never any proof offered to establish that it might have been difficult to obtain a warrant for petitioner at that hour. One reason Martin offered for arresting petitioner before getting a warrant was that of convenience - a paddy wagon was soon to arrive on the scene:

> Q. ... why did you direct the arrest at that point without getting a warrant?
>
> A. Because the police were about to arrive with a paddy wagon to take away the other prisoners who had been arrested.

(SH. 36)

Upon entering petitioner's apartment, the officers saw petitioner, who was wearing only a pair of pants, in the living room, and they immediately placed him under arrest. They also saw his wife, who was wearing only a pair of panties (T.31). The couple's children were also present in the apartment (id.).

After arresting petitioner for conspiracy (SH. 21, 36, T.17), the officers proceeded to conduct a thorough search of his entire apartment.

In the bathroom, on a shelf in a closed cabinet under the sink, they found and seized a glassine bag, similar in size to the paper bag which petitioner had been seen carrying into the building, containing 10 ½

ounces of cocaine (T. 17-22, 50,93).* Then, in the kitchen, they found a scale (T.23-24). Finally, returning to the living room, they found a rolled-up dollar bill, with traces of white powder on it, secreted beneath the upholstery of a chair (T.64). All of these items were admitted in evidence against petitioner at trial.

Petitioner's conviction was affirmed, without opinion, by the Appellate Division, Second Department. People v. Rodriguez, 40 A.D. 2d 763 (2d Dept. 1972). In his Appellate Division brief on that appeal, petitioner attacked the legality of the officers' unannounced entry into his apartment. In the actual point heading of his POINT I of that brief, petitioner included the claim that the police had

> ... burst into his home without announcement... .

At page 16 of that brief, petitioner referred to the fact that the officers had:

> ... let themselves into the apartment without announcing their authority or even knocking.

---

*/ Appellant's brief, at p.8, refers to the bag of cocaine only as having been in the bathroom. By neglecting to mention that the cocaine was indeed inside a closed cabinet, appellant improperly leaves the erroneous impression that the cocaine was in plain view.

And again, at page 23 of his brief in the Appellate Division, petitioner argued that the unannounced entry was illegal:

> We point out to the Court that the search herein was bad from several points of view. In the first place, the police had no right to enter the premises without announcing their authority.

Nor did petitioner's unannounced-entry argument go unnoticed by the state; it was specifically responded to by the state in its brief in the Appellate Division, at page 7.

After the affirmance by the Appellate Division, petitioner sought leave to appeal to the New York Court of Appeals. Leave was denied, per Breitel, J., on November 2, 1972. Petitioner then brought the instant petition for a writ of habeas corpus in the United States District Court for the Southern District of New York, arguing several reasons why his conviction had been in violation of the laws of the United States.

2) <u>The Opinion of the District Court</u>

On September 23, 1975, the District Court granted the petition:

> The court finds that Rodriquez' judgment of conviction was a product of an unannounced entry into his apartment by police officers in violation of the Fourth Amendment.
>
> (Opinion of the District Court, at p.2.)

The Court also ruled that petitioner had properly exhausted his state remedies on the unannounced entry issue and that respondent's argument to the contrary was meritless:

> The court finds from the record that petitioner has met the exhaustion requirement in that in the state proceedings, each issue now before the court was properly raised and considered. Respondent's claim that petitioner did not sufficiently raise the issue of the unannounced police entry is without merit. ... As petitioner points out, this very issue was raised before the Appellate Division in both petitioner's and respondent's briefs,giving the state adequate opportunity to review petitioner's claim.
>
> (Opinion, at page 7)

On the issue of the unannounced entry, the Court, in a detailed, well-reasoned opinion (at pp.16 through 23), found that the common law rule of announcement, which is incorporated in the Fourth Amendment as an essential element of a legal entry, was violated in the instant case, and that there was no sufficiently compelling exigent circumstance in the instant case to merit an exception to the rule.*

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*/ The Court, in granting the instant petition, rejected petitioner's alternative claims for relief. Although, on this appeal, we do not concede the correctness of the ruling on those alternative claims, especially the claim of lack of probable cause, the Court's findings and rulings on petitioner's unannounced entry claim are a sufficient and independent basis for the relief herein, which petitioner has been seeking since January 14, 1969.

ARGUMENT

POINT I

THE COURT PROPERLY FOUND THAT PETITIONER HAD EXHAUSTED STATE REMEDIES ON THE UNANNOUNCED ENTRY ISSUE, WHICH WAS RAISED IN THE APPELLATE DIVISION IN BOTH PETITIONER'S AND RESPONDENT'S BRIEFS, GIVING THE STATE ADEQUATE OPPORTUNITY TO REVIEW PETITIONER'S CLAIM.

Petitioner raised his unannounced entry claim in POINT I of his brief in the Appellate Division. Indeed, he placed it, unambiguously, in the very heading of that point:

> [the police] burst into his home without announcement... .

Twice during the text of that point in his Appellate Division brief, petitioner restated that same claim, and with unquestionable clarity:

> [the police] let themselves into the apartment without announcing their authority or even knocking.
>
> (Petitioner's Appellate Division Brief, at p.16)

> We point out to the Court that the search herein was bad from several points of view. In the first place, the police had no right to enter the premises without announcing their authority.
>
> (Id., at p.23)

The state was thus made aware of petitioner's unannounced entry claim, and it responded to that claim,

on the merits, in its brief in the Appellate Division.* Significantly, respondent, in the Appelate Division, did not argue that the point had not been raised in the trial court, but chose, instead, to respond to the point on the merits.** The issue of the unannounced entry was thus clearly presented to the Appellate Division, which certainly had the power to resolve all relevant legal and factual issues. N.Y. Criminal Procedure Law §470.15(1).

This consideration, by the Appellate Division, of petitioner's unannounced entry claim, satisfies the exhaustion requirement of 28 U.S.C. §2254. Brown v. Allen, 344 U.S. 443, 447 (1953)***; Picard v. Connor, 404 U.S. 270, 276 (1971).

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*/ See Respondent's Brief in the Appellate Division, at p.7.

**/ In his brief in this Court (at p.15, first footnote), respondent-appellant seems to argue that the fact that the District Court noted that respondent, in the Appellate Division, responded to petitioner's unannounced entry claim, proves that petitioner did not sufficiently raise that claim. We find this argument to be somewhat of a non sequitur.

***/ Respondent's brief in this Court makes no reference to Brown, supra, which the District Court specifically relied on in its opinion, at p.7.

> [P]lenary consideration of such an objection by a state appellate court meets the exhaustion requirement... .
>
> Brathwaite v. Manson, ____F.2d ____, (2d Cir., November 20,1975), slip op. 595, at 599.

Appellant's failure-to-exhaust claim in the instant case is thus, as the District Court properly found, totally devoid of any merit. The Court's opinion was obviously correct and the order appealed from must be affirmed.

POINT II

THE COURT PROPERLY RULED THAT THE UNANNOUNCED POLICE ENTRY, WHICH WAS AIMED AT ARRESTING PETITIONER FOR CONSPIRACY, AND NOT AT SEIZING NARCOTICS, VIOLATED THE FOURTH AMENDMENT AND THAT THERE WAS NO SUFFICIENTLY COMPELLING CIRCUMSTANCE IN THE INSTANT CASE TO MERIT AN EXCEPTION TO THE RULE.

The Fourth Amendment incorporates the common law requirement that police announce their authority and purposes as an essential element of a legal entry. Ker v. California, 374 U.S. 23, 37, 47 (1963).* There was not, of course, any announcement of authority or purpose in the instant case: The police, using a

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*/ See also, Miller v. United States, 357 U.S. 301 (1958); 18 U.S.C. §3109; 21 U.S.C. §879(b); former N.Y. Code of Criminal Procedure §§178 and 799 ["after notice of his office and purpose"], in force at the time of petitioner's arrest.

passkey, entered petitioner's apartment at 3:00 in the morning, finding petitioner and his wife only partially clothed, with the wife clad only in panties. Petitioner was not fleeing nor attempting to escape. Nor was he in the process of destroying any evidence. Nor is there any evidence in the record to suggest that he knew or even suspected that he was about to be arrested or that weapons were involved.

The District Court held that an arrest warrant was unnecessary under the circumstances of this case, but that there was no sufficiently compelling reason or exigent circumstance here to merit an exception to the announcement rule. Respondent argues that whatever reasons sufficed to convince the court that a warrant was unnecessary must, necessarily, justify dispensing with the announcement requirement, and that the Court's ruling to the contrary was "incongruous" and "anomalous" (Respondent's brief, at pp. 17,25).

But there is an obvious distinction between the degree of exigency which justifies an arrest without a warrant and the additional amount of exigency which will also permit an unannounced entry: It is clear that, with even the most ready and cooperative magistrate, it will take time - <u>at least half an hour</u> - before officers at the scene can arrange to obtain a warrant; it takes only <u>seconds</u> for an officer

to announce his authority and purpose.* In the minimum of several minutes which it takes to get a warrant, large amounts of contraband can be destroyed, criminals can flee, suspects can learn that they are soon to be arrested. But in the 5 seconds or less that it takes police to announce their authority and purpose, there is no time to flee, to destroy contraband or to make plans; there is merely enough time for the subjects to cover their nakedness and perhaps to open the door for the police. Note, Announcement in Police Entries, 80 Yale L.J. 139, 153 (1970).

There is thus nothing at all "incongruous" in the Court's finding that a warrant was not required and that announcement was required.

The Court's learned opinion (at pp.16-24) carefully refutes the various arguments again raised in this Court by respondent as to possible exigent circumstances which might merit an exception to the announcement rule. The fact that paddy wagons were enroute was not significant, for "announcement would have only taken a few moments, and the paddy wagons could have been delayed briefly by radio communication" (Opinion, at p.19).

The Court properly found that all the other factors cited by respondent were indeed factors that went

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*/ It takes less than 5 seconds to say "Police. Open the door. You are under arrest."

to the question of probable cause, and not to the question of whether the situation justified dispensing with the requirement of an announcement, which would take only seconds (Opinion, at pp.19-20).

Similarly, the Court properly held that the mere fact that the evidence ultimately seized was destructible did not, on the facts of this case, merit an unannounced entry (Opinion, at pp.20-21). This case is clearly distinguishable from Ker, supra, where,

> Ker's furtive conduct in eluding [the arresting officers] shortly before the arrest was ground for the belief that he might well have been expecting the police.
>
> Ker v. California, supra, 374 U.S. at 40.

In the instant case, there is no evidence that petitioner or his wife, who were half naked, at 3 a.m., were expecting the police to arrive or were doing anything furtive. Thus, in Ker, it was reasonable for the police to believe that Ker, who had eluded them, was now actually destroying the contraband; in petitioner's case, the police could only reasonably believe that the contraband, if any, was destructible.

In United States v. Likas, 448 F.2d 607, the officers had a warrant to specifically search for flash paper, "a highly inflammable substance which can

be quickly destroyed" (448 F.2d at 608). The officers failed to announce their authority or purpose. In Likas, where it was clear that the substance was easily destructible, but where there was no basis to believe that it was actually being or about to be destroyed, the Court held that:

> the present record simply does not reveal any substantial basis for excusing the failure of the agents to announce their authority and purpose.
>
> United States v. Likas, supra, 448 F.2d at 609.*

Most significantly, there is no real argument here about fear of contraband being destroyed, because, as the assistant district attorney who supervised and ordered the arrest conceded, the officers did not go to petitioner's apartment to seize contraband; they went to arrest petitioner for conspiracy:

> I did not send them to make a search or seize narcotics. I sent them to arrest for a conspiracy for narcotic drugs.
>
> (SH.42)

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*/ See also, Vale v. Louisiana, 399 U.S. 30, 35 (1970) ["in the process of destruction"]; Ker, supra, 374 U.S. at 47 ["an escape or destruction of the evidence is being attempted"]; McDonald v. United States, 335 U.S. 451, 455 ["not fleeing or seeking to escape. Nor was the property in the process of destruction"].

For all the above reasons, the Court properly ruled that the unannounced entry violated petitioner's rights under the Fourth Amendment and that there was no sufficiently compelling circumstance in the instant case to justify an exception to the announcement rule.

CONCLUSION

THE ORDER OF THE DISTRICT COURT SHOULD BE AFFIRMED.

Respectfully submitted,

JESSE BERMAN
Attorney for Petitioner-Appellee
351 Broadway
New York, New York 10013
(212) 431-4600

December 8, 1975.

Counsel for petitioner-appellee wished to thank Steven Bernstein, law clerk, for his indispensable assistance in the preparation of this brief.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

JESSE BERMAN, being duly sworn, deposes and says:

That on the 8th day of December, 1975, I served the within Brief for Petitioner-Appellee upon Louis J. Lefkowitz, attorney for Respondents-Appellants in this action, at Two World Trade Center, NY, NY 10047, the address designated by said attorney for that purpose, by depositing a true copy of same, enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Jesse Berman

JESSE BERMAN

Sworn to before me this
8th day of December, 1975.

Steven Bernstein

STEVEN BERNSTEIN
NOTARY PUBLIC, STATE OF NEW YORK
No. 31-4520522
Qualified in New York County
Term Expires March 30, 1976